

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
CHARLOTTESVILLE DIVISION

CLERKS OFFICE U.S. DIST. COURT
AT CHARLOTTESVILLE, VA
FILED
05/28/2019
JULIA C. DUDLEY, CLERK
BY: /s/ J. JONES
DEPUTY CLERK

APEX GCL, LLC,

Plaintiff,

v.

Civil Action No. 3:19-cv-00032

SEVENTUS LLC,
and
SURE POWER LLC
and
TIMOTHY ROSENSWEIG
and
ANDREW EVANS,

Defendants.

COMPLAINT

Apex GCL, LLC, by its undersigned counsel states as follows for its Complaint:

1. Apex GCL, LLC is a Delaware limited liability company whose sole member is Apex Clean Energy Holdings, LLC.

2. Apex GCL, LLC and Apex Clean Energy Holdings, LLC's principal place of business is Charlottesville, Virginia.

3. All pertinent Agreements were executed and signed by Apex GCL, LLC and Apex Clean Energy Holdings, LLC in Charlottesville, Virginia.

4. Upon information and belief, Seventus LLC ("Seventus") is an Illinois limited liability company.

5. Upon information and belief, Sure Power LLC ("Sure Power") was an Illinois limited liability company whose new limited liability name is Seventus.

6. Upon information and belief, Timothy Rosensweig is a citizen and resident of Illinois.

7. Upon information and belief, Andrew Evans is a citizen and resident of Illinois.

8. On December 29, 2016, Sure Power entered into a Subordinated Secured Promissory Note in favor of Apex GCL, LLC in the amount of \$2,250,000 to finance the acquisition of Wharton Wind LLC (the "Promissory Note"). A copy of the Promissory Note is attached as Exhibit 1.

9. The Promissory Note required, in part:

- i. A \$1,000,000 payment on or before April 30, 2017;
- ii. 10% per annum interest;
- iii. Payment by December 31, 2018;
- iv. The Promissory Note to be subordinated pursuant to the terms of a subordination agreement; and
- v. The Promissory Note to be secured by the collateral described in a pledge agreement.

10. At the time of the Promissory Note, Pivot Power LLC, a Delaware limited liability company, owned 5.1% of Sure Power.

11. On December 29, 2016, Timothy Rosensweig and Andrew Evans entered into a Limited Recourse Pledge Agreement in favor of Apex GCL, LLC (the "Pledge Agreement") where they pledged their Pivot Power LLC Class B Units as collateral for the Promissory Note. A copy of the Pledge Agreement is attached as Exhibit 2.

12. Upon information and belief, Timothy Rosensweig and Andrew Evans each own 2,550 Class B Units, or 5.1%, of Pivot Power LLC.

13. On December 30, 2016, Apex GCL, LLC entered into a Subordination Agreement with Export-Import Bank of India (the "Subordination Agreement") that subordinates Apex GCL, LLC's note to that of the Export-Import Bank of India, except to the payments that are the subject of this lawsuit, specifically "to the extent of \$1,250,000 plus outstanding interest." A copy of the Subordination Agreement is attached as Exhibit 3.

14. On August 3, 2018, Plaintiff and Defendants clarified the December 29, 2016 Subordinated Secured Promissory Note via a Letter Agreement which in part confirmed "that interest under the Subordinated Secured Promissory Note dated December 30, 2016 between Seller and Purchaser accrues on a simple basis, not compounded."

15. On February 13, 2019, Seventus (formerly Sure Power) executed a First Amendment to the Subordinated Secured Promissory Note in favor of Apex GCL, LLC that was effective December 31, 2018 (the "First Amendment to the Promissory Note"). A copy of the First Amendment to the Promissory Note is attached as Exhibit 4.

16. The First Amendment to the Promissory Note included the following Interest clause:

Interest will accrue on a simple basis on the outstanding principal amount hereof, until the same is paid in full, at a rate equal to: (1) for the period between December 29, 2016 through and including December 31, 2018, 10% per annum; and (2) for the period between January 1, 2019 and the date on which the outstanding principal amount hereof is paid in full, 20% per annum (the "Interest Rate"). All interest shall be computed on the basis of a 365-day year and paid for the actual number of days elapsed. All accrued, unpaid interest shall be due and payable on the Maturity Date. Notwithstanding anything herein to the contrary, on or before March 31, 2019, Company shall pay the outstanding interest accrued as of December 31, 2018, in the amount of Two Hundred and Twenty Four Thousand, Eight Hundred and Thirty-Two Dollars (\$224,832), and to the extent the foregoing is not paid on or before March 31, 2019, such shall constitute an Event of Default.

17. Defendants' failure to pay the interest on or before March 31, 2019 constituted an Event of Default under the Promissory Note.

18. Pursuant to Section 1(e) of the Note, the Event of Default triggered acceleration of the Promissory Note and \$1,617,141.53 of principal and interest (the "Payment") was due to Apex GCL, LLC on March 31, 2019.

19. On April 1, 2019, Apex GCL, LLC sent a notice of default that stated that the Defendants were in default of the Promissory Note and that nonpayment constituted an Event of Default by Company under Section 2(a) of the Promissory Note.

20. In the notice of default letter, Apex GCL, LLC requested immediate remittance of the Payment, together with all accrued interest thereon through the date of such remittance (\$1,617,141.53 as of April 1, 2019).

21. As of the filing of this lawsuit, Apex has not received the Payment and understands that the Defendants do not intend to make the Payment.

22. Interest is accruing at 20%, or \$727.05/day.

**COUNT I: BREACH OF CONTRACT AND PURSUANT TO PURSUANT
VA. CODE § 8.01-28 (AGAINST SEVENTUS LLC AND SURE POWER LLC)**

23. Plaintiff repleads and incorporates by reference the allegations contained in paragraphs 1-22.

24. Defendants Seventus LLC and Sure Power LLC breached their contract with Apex GCL, LLC including the terms of the Promissory Note, the August 3, 2018, Letter Agreement and the First Amendment to the Promissory Note.

25. Apex GCL, LLC has been damaged in the amount of \$1,617,141.53 as of April 1, 2019 plus \$42,168.90 (interest of April 1, 2019 through May 28, 2019) with interest accruing at a rate of 20% or \$727.05/day.

**COUNT II: DECLARATORY JUDGMENT
(AGAINST TIMOTHY ROSENSWEIG AND ANDREW EVANS)**

26. Plaintiff repleads and incorporates by reference the allegations contained in paragraphs 1-25.

27. Plaintiff, by this Complaint, serves notice to Timothy Rosensweig and Andrew Evans that the Apex GCL, LLC is exercising its rights under the Pledge Agreement in respect to the of Default describe in Count I.

28. Upon and after delivery of this lawsuit which contains the Enforcement Notice, Timothy Rosensweig and Andrew Evans shall cease all voting, consensual, managerial, membership and other rights pertaining to 2,550 Class B Units of Pivot Power LLC or 5.1% of Pivot Power LLC.

29. Apex GCL, LLC seeks confirmation and a declaration that no liabilities have attached to the 2,550 Class B Units of Pivot Power LLC or 5.1% of Pivot Power LLC before seeking an Order transferring the whole or any part of the 2,550 Class B Units of Pivot Power

LLC or 5.1% of Pivot Power LLC into the name of the Apex GCL, LLC or the name of its nominee or having all voting, consensual, managerial, membership and other rights pertaining to the 2,550 Class B Units of Pivot Power LLC or 5.1% of Pivot Power LLC become vested in Apex GCL LLC.

WHEREFORE, Apex GCL, LLC, by its undersigned counsel, respectfully requests that this Court enter:

1. A judgment in its favor and against Seventus LLC and Sure Power LLC in the amount of \$1,617,141.53 as of April 1, 2019 plus \$42,168.90 (interest of April 1, 2019 through May 28, 2019) with interest accruing at a rate of 20% or \$727.05/day plus costs;

2. A judgment against Timothy Rosensweig and Andrew Evans ordering a declaration that the Pledge Agreement requires them to cease all voting, consensual, managerial, membership and other rights pertaining to 2,550 Class B Units of Pivot Power LLC or 5.1% of Pivot Power LLC;

3. A judgment against Timothy Rosensweig and Andrew Evans ordering a declaration that the Pledge Agreement requires them to confirm that no liabilities have attached to the 2,550 Class B Units of Pivot Power LLC or 5.1% of Pivot Power LLC;

4. A judgment against Timothy Rosensweig and Andrew Evans ordering a declaration that the Pledge Agreement requires transfer in the whole or any part of the 2,550 Class B Units of Pivot Power LLC or 5.1% of Pivot Power LLC into the name of the Apex GCL, LLC or the name of its nominee or having all voting, consensual, managerial, membership and other rights pertaining to the 2,550 Class B Units of Pivot Power LLC or 5.1% of Pivot Power LLC become vested in Apex GCL, LLC; and

5. Pre-judgment interest, post-judgment interest at 20% or \$727.05/day, costs and any such other relief this Court deems just and necessary.

Date: May 28, 2019

Respectfully submitted

APEX GCL, LLC

By: /s/ Jonathan T. Blank

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